BUSINESS LAW SECTION
THE STATE BAR OF CALIFORNIA

January 30, 2006

Ms. Romunda Price
Judicial Council
455 Golden Gate Avenue
San Francisco, CA 94102

Dear Ms. Price:

This letter is submitted by the Alternative Dispute Resolution Committee of the Business Law Section of the State Bar of California (the "Committee") at the invitation of the Judicial Council to respond to proposed changes to Standard 3 and to comment on other aspects of the current Ethics Standards for Neutral Arbitrators in Contractual Arbitration (the "Ethics Standards" or the "Standards").

These comments are provided on behalf of the Committee. Please note that positions set forth in this letter are only those of the Committee. As such, they have not been adopted either by the State Bar's Board of Governors, its overall membership, or the overall membership of the Business Law Section, and are not to be construed as representing the position of the State Bar of California. The Committee is composed of twenty members, including a number of neutrals (both full-time and part-time) as well as attorneys regularly advising California corporations and out-of-state corporations transacting business in California. Committee activities relating to these positions are funded from voluntary sources.

The Committee supports the proposed changes to Standard 3, which are necessitated by the decisions in Jevne v. Superior Court (2005) 35 Cal. 4th 935 and Credit Suisse First Boston Corp. v. Grunewald (9th Cir. 2005) 400 F. 3d 1119. We believe that the changes proposed by the Judicial Council are appropriate to comply with the rulings of those cases relative to certain securities arbitrations.

As requested by the Judicial Council, we have also prepared comments regarding the Ethics Standards. Generally, these comments are directed to the Judicial Council for assistance in clarifying the Standards. Questions about certain requirements of the Standards have arisen as arbitrators have attempted to follow them in their practices. These concerns are summarized below.

1. Standard 3(b) exempts certain arbitrators serving in, for example, labor arbitrations (and certain securities arbitrations as noted above) from having to comply with the

Standards. However, the obligation of arbitrators to make disclosures about prior exempt arbitrations for subsequent non-exempt arbitrations is unclear. For example, if the same lawyer or law firm were a participant in an exempt arbitration, must the arbitrator make the appropriate disclosure when appointed to a commercial arbitration? If so, arbitrators should be advised that they must, regardless of exemption, keep records of exempt arbitrations for purposes of future disclosure in non-exempt arbitrations.

2. Some arbitrators serve as pro tem judges, as settlement judges, or as other pro bono or paid court officers servicing large caseloads. Some also serve as mediators for federal government agencies such as the EEOC. Clarification by the Judicial Council of the obligations of arbitrators to make disclosures about parties, and lawyers for a parties in arbitrations, mediations or other alternative dispute resolution services they have conducted, under local, state or federal government supervision or management would be valuable.

3. The Standards require disclosure of any matter that might cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial. Some arbitrators wonder if that includes disclosing names of fellow arbitration panel members in past arbitrations. Should arbitrators be keeping records of fellow arbitrators with whom they have served in tripartite arbitrations for future disclosure should the same arbitrators be appointed to serve with them in subsequent cases?

4. The Ethics Standards contain requirements that certain matters be disclosed by any person "nominated or appointed" as an arbitrator. (Standard 7(a)). The meaning of "nominated" is unclear, and clarification in the Ethics Standards would be helpful. In addition, many of the disclosure obligations are tied to cases in which an arbitrator has "served" or "is serving." Clarification of the meaning of those terms would also be helpful. For example, does the term "serve" encompass being chosen by an arbitration provider and subsequently disqualified by one of the parties, where the arbitrator may have simply scheduled a preliminary conference call?. It is important for arbitrators to know whether they should be keeping records under that and similar scenarios, given the disclosure obligations.

5. Some arbitration cases settle before hearing or are put in abeyance for an indeterminate time. The Standards might clarify the obligation of arbitrators to provide information about these cases as well as those which have gone through the hearing stage.

6. Standard 10(a)(3) provides for disqualification of an arbitrator if a disclosure is made more than 10 calendar days after appointment and a party serves a notice of disqualification in the manner and time specified in Cal. Code Civ. Proc §1281.91. According to the statute, disqualification of the arbitrator is not permitted after a

hearing of any "contested issue of fact relating to the merits of the claim or after any ruling by the arbitrator regarding any contested matter". Cal. Code Civ. Proc §1281.91(c). The meaning of "contested matter" is unclear under some rather typical circumstances: For example, expert witnesses are identified after a pre-hearing conference call in which the arbitrator has ruled on discovery issues. At that time, the arbitrator realizes a potential conflict with such expert witness and makes the required disclosure. One party objects to the arbitrator's continued service despite the declaration of the arbitrator that the conflict does not create any partiality.

In that context, the Judicial Council would appropriately consider the following questions: Does the party have the right to disqualify the arbitrator; should an arbitrator recuse himself or herself under these circumstances; does the statute contemplate decisions made by the arbitrator regarding discovery matters about which the parties frequently have opposing views but which may not necessarily be viewed as a "contested matter?"

7. According to case law interpreting Standard 10, Cal. Code Civ. Proc. §1281.91, "confers on both parties the unqualified right to remove a proposed arbitrator based on any disclosure required by law which could affect his or her neutrality." (*Azteca Construction, Inc. v. ADR Consulting*, (2004) 121 Cal App 4th 1156, at 1163.) The right to disqualify for immaterial disclosures at appointment or early in the case does not present a problem. However, arbitrators have a continuing duty to disclose any connection they may have to parties, lawyers or material witnesses in the dispute. (See #6 above). If such disclosure is immaterial or was inadvertently not made at the time of appointment, immediate disqualification is possible and significant expense and resources may have been wasted. Materiality and prejudice should be factors in determining whether disqualification is appropriate in such circumstances. In the past, provider organizations made the determination. This was a safety valve to continue the arbitration when there is no good reason to disqualify the arbitrator. If there is a good reason to disqualify based on prejudice, vacatur of the award is possible. If there is no provider organization, the court or the arbitrator should be able to make that determination.

   The right for unqualified disqualification can also trigger bad faith by a party that dislikes an arbitrator's procedural determinations. A party can bring in a material witness or change counsel known to have a prior relationship with the arbitrator in order to force a disqualification. This could be rectified by changing Standard 10(a)(3) to a "material disclosure" rather than an "required disclosure".

These are some of the issues which have arisen from arbitrators as they have accumulated experience adapting to the requirements of the Ethics Standards. The Committee appreciates the interest of the Judicial Council in soliciting these comments and for the opportunity to present them.

Sincerely,

MICHAEL P. CARBONE
Co-Chair
Alternative Dispute Resolution Committee

cc: Neil J.Wertlieb, Esq. Vice Chair-Legislation, Business Law Section
Executive Committee
Ruth V. Glick
Susan Keenberg
Larry Doyle
Saul Bercovitch